STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

JAMES ALIN MOORE, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT OF PERSONNEL ADMINISTRATION), Respondent.	)	Case No. SF-CE-85-S PERB Decision No. 772-S September 29, 1939

Appearances: James Alin Moore, on his own behalf; Kenneth R. Hulse, Labor Relations Counsel, for the State of California (Department of Personnel Administration).

Before Porter, Shank and Camilli, Members.

DECISION

CAMILLI, Member: This case is before the Public Employment Relations Board (PERB) on exceptions filed by James Alin Moore (Moore) to the attached proposed decision of a PERB administrative law judge (ALJ). The ALJ found that Moore was appropriately dismissed from his position with the State Department of Rehabilitation (Department); specifically, Moore's protected activities under the Ralph C. Dills Act (Dills Act)[1] were not the basis for his dismissal.

DISCUSSION

Moore was employed in the Department's Santa Cruz office as a vocational rehabilitation counselor. Moore received a formal reprimand on February 20, 1986, for sexual harassment based on a

[1]The Dills Act is codified at Government Code section 3512 et seq.

complaint filed by a co-worker. A second separate case of sexual harassment, based on a subsequent complaint, resulted in Moore's dismissal, effective July 15, 1986. Moore appealed the letter of reprimand and the discharge to the State Personnel Board (SPB). The appeals were consolidated and a hearing was held on October 24, November 21, and December 12, 1986, before an SPB administrative law judge. The administrative law judge upheld the letter of reprimand and discharge. On May 5, 1987, the SPB adopted the findings and conclusions of the administrative law judge, and on July 21, 1987, denied a petition for a rehearing. Santa Cruz County Superior Court has denied Moore's Petition for Writ of Mandate, Prohibition or other Appropriate Writ.

On August 12, 1987, Moore filed an unfair practice charge with PERB alleging that he had been dismissed from state employment due to his protected activities as a union representative.

Government Code section 3514.5, subdivision (a), proscribes the issuance of a complaint "in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." This statutory proscription is jurisdictional. (California State University, San Diego (1989) PERB Decision No. 718-H, pp. 8-15.)

As Moore filed his charge more than six months after the occurrence of the alleged unfair practice, the charge and complaint must be dismissed for lack of jurisdiction.

Even assuming that PERB had jurisdiction, Moore has shown only that he was involved in protected activity under the Dills Act and that some Department officials were aware of that activity. The record, however, fails to show any evidence to support Moore's contention that Department officials had an unlawful motive in imposing discipline on the grounds of sexual harassment.[2]

ORDER

For the foregoing reason, the unfair practice charge in Case No. SF-CE-85-S is hereby DISMISSED.

Member Shank joined in this Decision.

Member Porter's concurrence begins on page 4.

[2]The anti-union retaliation defense could have been, but was not, raised before the SPB. Had the defense been raised, litigated and decided by the SPB, and had a charge been timely filed with PERB, PERB nevertheless would have declined to exercise jurisdiction under the collateral estoppel doctrine. State of California (Department of Developmental Services) (1987) PERB Decision No. 619-S. Since this case is being dismissed for Untimeliness, we need not now decide the question of whether PERB should have declined to exercise jurisdiction based on the charging party's failure to raise this defense before the SPB.

Porter, Member, concurring: I concur in the dismissal of the unfair practice charge for lack of jurisdiction due to the charging party's (Moore) failure to file the unfair practice charge within six months of the occurrence of the alleged unfair practice. I also agree with my colleagues that, on the merits, Moore did not establish an unfair practice violation by either the respondent Department of Personnel Administration (DPA) or by the Department of Rehabilitation.[1] My concurrence is also based on a separate and independent threshold jurisdictional ground: the Public Employment Relations Board's (PERB or Board) lack of jurisdiction with respect to state civil service dismissals and/or other civil service disciplinary actions within the constitutional jurisdiction of the State Personnel Board.

A chronological synopsis of the pertinent facts may be helpful.

Moore was a permanent state civil service employee holding a vocational rehabilitation counselor position in the Department of Rehabilitation. Certain "sexual harassment" complaints against Moore, by a Santa Cruz County female employee in 1985, resulted in the Department of Rehabilitation counseling Moore and giving

[1]The instant charge concerns an alleged unfair practice by the Department of Rehabilitation. The named respondent party is the Department of Personnel Administration, within which is the Division of Labor Relations, the designated representative of the Governor in collective bargaining matters under the State Employer-Employee Relations Act (SEERA) (see Gov. Code, secs. 3517 and 19819.5). The respondent DPA is a legislatively created administrative agency (Stats. 1981, ch. 230) which should not be confused with the constitutionally created State Personnel Board (Cal. Const., art. VII).

him a civil service disciplinary Notice of Formal Reprimand, with the Formal Reprimand becoming effective on February 28, 1986.[2] Moore appealed the Formal Reprimand to the State Personnel Board. While the latter appeal was pending, another female rehabilitation counselor and co-worker of Moore's filed a "sexual harassment" complaint against Moore for acts occurring from mid-1985 through the first part of 1986. This resulted in the Department of Rehabilitation filing a civil service disciplinary notice of dismissal against Moore, effective July 25, 1986. Moore appealed the latter action to the State Personnel Board, and the Formal Reprimand and the Dismissal were consolidated for hearing by the State Personnel Board. An adjudicatory hearing was held before an administrative law judge (ALJ) of the State Personnel Board (SPB) on October 24, November 21 and December 12 of 1986. Moore was present at the SPB hearings and was represented by a field representative of the American Federation of State, County, and Municipal Employees (AFSCME), Moore's union and the exclusive representative of Moore's state bargaining unit.

At the SPB hearings, at which Moore and a number of

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[2]The Notice of Formal Reprimand was served on Moore on February 11, 1986, and advised Moore of his right to review the materials upon which the disciplinary action was based, and of his rights to respond in writing or orally and/or to arrange a meeting with the assistant deputy director prior to the February 28 effective date. (See SPB Rule 61, 2 Cal. Admin. Code, sec. 61; Skelly v. State Personnel Board (1975) 15 Cal.3d 194, 215.) Moore was also advised of his right to appeal the Formal Reprimand to the State Personnel Board regardless of whether he chose to respond to the Notice.

Department of Rehabilitation employees and supervisors testified, Moore and his union representative did not raise any suggestion or inference in his testimony or in the questioning of any of the department witnesses that Moore's union activities played any part in his dismissal. Moore testified that he had never had any job performance problems, had gone through five different probationary periods, had received four promotions, had been a CSEA job steward and was active in AFSCME as a board member, and had "always gotten along very well" with co-workers and "with management." Moore did testify that he may have encountered some on-the-job difficulties--including a petition by some of his co-workers that he be transferred--because he was a "recovering alcoholic." While Moore denied any improper acts toward the two female employees, his union representative presented the testimony of Moore's psychologist who testified as to what he perceived to be the psychological motivation behind the way Moore acted toward the female employees and how Moore may have misconceived how the employees were responding to him. The psychologist gave his opinion that, if Moore was retained on the job and unequivocally told to stay away from the two female employees, he believed Moore would comply. Moore's union representative also attempted to suggest, in his questioning of one of the department's supervisors, that the reason why such severe discipline was being taken against Moore was because of an already pending civil lawsuit against the Department of Rehabilitation in connection with another sexual harassment case

involving a different department employee (not Moore).

On December 31, 1986, following the receipt of the parties' final written closing arguments, the matter was deemed submitted to the ALJ for a proposed decision.

On February 4, 1987, while the ALJ's proposed decision in the SPB proceedings was pending, Moore filed an unfair practice charge with PERB, charging that his dismissal of July 25, 1986, was because of his union activities.[3]

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[3]The record herein shows that following the dismissal Moore also filed for unemployment insurance benefits. The California Employment Development Department (EDD) denied unemployment benefits on the basis that Moore was disqualified, having been discharged for misconduct. On September 4, 1986, Moore appealed EDD's denial of unemployment benefits. Hearings on this appeal were held on November 20 and December 23, 1986, before an ALJ of the California Unemployment Insurance Appeals Board (CUIAB). On December 31, 1986, the ALJ issued his decision which made factual findings that Moore had physically and verbally sexually harassed a female employee, and that Moore had previously been reprimanded for similar conduct against another female. The ALJ found that Moore had been discharged for misconduct and affirmed EDD's denial of unemployment benefits. The ALJ concluded in his decision:

> The claimant [Moore] did sexually harass a female employee. He continued in this harassment after he had been told by her that he should stop. He had previously been warned against this kind of conduct by his employer. The claimant's action created an intimidating and offensive working environment for this co-worker, and his actions were in wilful and intentional disregard of the legitimate interests of the employer. The claimant's conduct did amount to misconduct under section 1256 of the code [Unemployment Insurance Code], and he is accordingly disqualified for benefits.

Moore then appealed the ALJ's decision to the CUIAB itself. On April 21, 1987, the CUIAB rendered its decision which adopted the findings and conclusions of the ALJ as its own and affirmed the ALJ's decision denying benefits. Nowhere in the decisions

On April 12, 1987, the ALJ rendered a proposed decision in the SPB proceedings, with findings that Moore had engaged in offensive conduct and unlawful sexual harassment which constituted cause for discipline under the State Civil Service Act, and that:

> The two complaining witnesses were credible and convincing and painted a consistent picture of blatantly offensive conduct on the part of the appellant. In both cases, the appellant made repeated attempts to interest the women in a sexual relationship despite their expressed lack of interest in any such relationship. In both cases, the appellant accompanied these unwanted advances with physical conduct of the crudest form. Both complaining witnesses felt humiliated, nauseated, and depressed about the appellant's actions towards them. Both have had to seek professional counseling as a result of their encounters with the appellant.
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> The appellant's conduct caused considerable harm to the public service by discrediting the appellant's agency and by opening the State of California to legal liability for the appellant's actions. The appellant's conduct was repetitive and did not abate following his receipt of the official letter of reprimand as evidenced by his conduct at the district staff meeting on June 11, 1986. During his testimony, the appellant showed no insight into the problems he created for the complaining witnesses and shows little prospect of being able to avoid similar situations in the future. Under these circumstances, the official reprimand and the dismissal from state service are warranted and must be sustained.

The proposed decision then provided that the official reprimand

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of the ALJ or of the CUIAB are there any indications that Moore made any assertion before EDD, the ALJ or the CUIAB that he had been discharged because of his lawful exercise of SEERA protected activities.

of February 28, 1986, and the dismissal effective July 25, 1986, "are hereby sustained without modification."

On May 5, 1987, the SPB adopted the ALJ's findings of fact and the proposed decision as its decision in the case. (SPB Dec. Nos. 20130 and 20858, May 5, 1987.)

On May 7, 1987, a PERB Board agent dismissed the February 4 unfair practice charge and "deferred" it to the grievance and binding arbitration process. On June 12, 1987, Moore filed the same unfair practice charge anew and alleged that it would be futile to "defer" the charge because of AFSCME's unwillingness to arbitrate the case. When Moore was advised that AFSCME had not yet made a final decision concerning arbitration, Moore withdrew the June 12 charge.

On August 12, 1987, Moore again filed the same unfair practice charge and alleged that it would be futile to pursue arbitration because AFSCME had made a final decision not to arbitrate his case. On August 24, 1987, a PERB Board agent issued an unfair practice complaint alleging that Moore had been dismissed on or about July 21, 1986, because of his exercise of employee rights guaranteed by SEERA.

In its answer to the complaint, and by motion prior to the PERB hearing on the complaint, the respondent DPA asserted that Moore was collaterally estopped by the final decision of the SPB from denying that he engaged in repeated, willful and intentional sexual harassment of female employees, or that his conduct warranted dismissal. The ALJ granted DPA's motion and, on the

basis of collateral estoppel, barred Moore from relitigating the issues decided by the SPB. In his proposed decision, the ALJ set forth:

> Applying the principles of collateral estoppel set forth above, and in the interest of seeking an "administrative accommodation" between PERB and SPB, the undersigned [ALJ] issued a ruling precluding relitigation of those issues earlier decided by the Personnel Board. Pacific Legal Foundation v. Brown (1981) 29 Cal.3d 168, 200, 172 Cal.Rptr. 487. Accordingly, Charging Party was not permitted in this unfair practice hearing to relitigate the issues concerning whether he actually engaged in the offensive conduct described above, and, if so, whether that conduct constituted sufficient reason to terminate. (Proposed dec, pp. 7-8.)

But, as set forth in the ALJ's proposed decision, since issues concerning Moore's protected union activities and any unlawful motivation on the part of the employer's agents "were not even mentioned during the SPB proceeding," the ALJ held that such issues were not barred by collateral estoppel. Relying on PERB precedent in State of California (Department of Transportation) (1984) PERB Decision No. 459-S, the ALJ held that Moore should have the opportunity to show that, "notwithstanding the conclusions reached by the SPB, he would not have been disciplined and/or discharged 'but for' his activity."

Following four days of formal PERB hearings, transcript preparation and briefing, the ALJ rendered a 50-page proposed decision which concluded that Moore's unfair practice charge should be dismissed in that: (1) there was no unlawful motive in the Department of Rehabilitation's decisions to reprimand and

terminate Moore, and (2) even assuming the evidence had shown an unlawful motive and the "but for" burden of proof had shifted to the respondent to show that it would have terminated Moore regardless of his protected activity, "the findings and conclusions of the SPB" satisfied such a burden and showed that Moore would have been reprimanded and terminated even if he had not engaged in protected activity.

PERB's Jurisdiction Over Civil Service Dismissals

While the collateral estoppel issue was raised with respect to the SPB decision, neither the ALJ nor any of the parties questioned PERB's jurisdiction to proceed in a matter involving a civil service dismissal which was within the constitutional jurisdiction and final authority of the State Personnel Board. (Cal. Const., art. VII, sec. 3; Gov. Code, sec. 19582, subd. (a); Boren v. State Personnel Board (1951) 37 Cal.2d 634, 639; Ng v. State Personnel Board (1977) 68 Cal.App.3d 600, 605, hg. den.; Blake v. State Personnel Board (1972) 25 Cal.App.3d 541, 544, hg. den.; Genser v. State Personnel Board (1952) 112 Cal.App.2d 77, 88-90; Wylie v. State Personnel Board (1949) 93 Cal.App.2d 838, 840-843; and see also Gov. Code, sec. 19575; Payne v. State Personnel Board (1958) 162 Cal.App.2d 679, 684-685, hg. den.) As the proposed decision indicates, the ALJ was aware (and presumably the parties) of this Board's prior SEERA decision in State of California (Department of Transportation), supra, PERB Decision No. 459-S, wherein this Board, relying on Pacific Legal

Foundation v. Brown (1981) 29 Cal.3d 168, concluded that, in matters involving civil service disciplinary actions which are within the jurisdiction of the SPB, PERB also has jurisdiction. The ALJ recognized and tangentially touched on this PERB-SPB jurisdictional issue when he based his ruling precluding relitigation of the issues already decided by the SPB not only on collateral estoppel principles, but also "in the interest of seeking an 'administrative accommodation' between PERB and SPB," and cited Pacific Legal Foundation v. Brown (Brown), supra.

Even though the issue of PERB's jurisdiction in this matter was not raised below, it is incumbent upon this Board to dismiss the matter if it is without jurisdiction. This is so, notwithstanding that the Board may have asserted such jurisdiction in an earlier decision.[4] (Lake Elsinore School District (1987) PERB Decision No. 646, pp. 16-20, and the cases cited therein; California State University - San Diego (1989) PERB Decision No. 718-H, pp. 8-14.)

Civil Service Disciplinary Actions and PLF v. Brown

Inasmuch as both the ALJ below and this Board in State of California (Department of Transportation), supra, PERB Decision No. 459-S, cited and relied on Brown for their respective holdings concerning PERB-SPB collateral estoppel

[4]PERB's Board agents and ALJs are, of course, bound by applicable PERB precedent at the charge processing, administrative hearing, and proposed decision stages of an unfair practice proceeding.

and jurisdictional issues, it is appropriate to examine exactly what the majority opinion in Brown held with respect to civil service disciplinary matters.

Some eight years ago, in Brown, challenges to the constitutionality of SEERA were made on various grounds.[5] One challenge was:

> . . . that the provisions of SEERA granting PERB jurisdiction to investigate and devise remedies for unfair practices are irreconcilably in conflict with the State Personnel Board's jurisdiction to "review disciplinary actions" under article VII, section 3, subdivision (a) [of the California Constitution].
> (Brown, p. 196.)

In concluding that SEERA's unfair practice provisions were not facially invalid or "unconstitutional on their face," the majority opinion observed:

> First, as the State Personnel Board itself recognizes, many areas of PERB's unfair practice jurisdiction do not overlap with the State Personnel Board's "disciplinary action" jurisdiction at all. In these areas, obviously, no constitutional problems arise. Thus, for example, if the state denies rights which SEERA grants to employee organizations, or the state fails to meet and confer in good faith, PERB could clearly adjudicate unfair practice charges against the state without any danger of conflict with the personnel board's disciplinary action jurisdiction. Moreover, even in the case of employer reprisals against an employee for protected activity, PERB's unfair practice jurisdiction would clearly pose no conflict with the State Personnel Board's jurisdiction if the reprisal took a form that did not constitute

[5]The main challenge in Brown concerned whether the setting of salaries was part of the constitutional classification authority of the SPB.

> a "disciplinary action" reviewable by the board. Because there is thus a substantial area in which PERB's unfair practice jurisdiction can unquestionably operate without damage to the State Personnel Board's jurisdiction, the provisions in question are not unconstitutional on their face.
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> Second, even in those areas in which the jurisdiction of the State Personnel Board and PERB do overlap, familiar rules of construction counsel our court to attempt to harmonize the disparate procedures, rather than simply to invalidate one or the other on broad constitutional grounds....
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> . . . . . .
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> Because no actual jurisdictional conflict between PERB and the State Personnel Board confronts us in this proceeding, we have no occasion to speculate on how some hypothetical dispute that might be presented for decision in the future should properly be resolved. . . .
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> Accordingly, we conclude that the fact that PERB's jurisdiction over unfair practices may in some cases overlap with the State Personnel Board's jurisdiction to review disciplinary actions provides no basis for finding the applicable provisions of SEERA unconstitutional on their face,
> (Brown, pp. 196-200.)

So, Brown did not hold that PERB does have unfair practice jurisdiction over civil service dismissal actions. Brown simply recognized that certain types of unfair practice adverse actions do not involve civil service "disciplinary actions" within SPB's disciplinary jurisdiction and, thus, could not overlap or conflict with said constitutional jurisdiction. But, Brown also recognized that, where an alleged unfair practice does involve a civil service "disciplinary action," there could be an overlapping and jurisdictional conflict, and that the resolution

of such a constitutional problem awaited the future presentment of an actual case. (Brown, pp. 196-197, 200.)

In holding that the unfair practice provisions of SEERA are not facially in conflict with SPB's constitutional authority and jurisdiction in state civil service disciplinary matters, Brown did not examine or determine SPB's actual authority and jurisdiction. In its preliminary synopsis of its holdings, the court set forth:

> Finally, we conclude that the provisions of SEERA granting the Public Employment Relations Board (PERB) initial jurisdiction to investigate and adjudicate "unfair practices" are not rendered unconstitutional on their face by virtue of the State Personnel Board's authority, under article VII, section 3, subdivision (a), to "review disciplinary actions" against civil service employees. As we point out, whatever the scope of the State Personnel Board's authority with respect to disciplinary actions there is a substantial area in which PERB's unfair practice jurisdiction does not overlap with the State Personnel Board's jurisdiction at all. Accordingly, for that reason alone, the statutory provision could not properly be invalidated on its face in this proceeding,
> (Brown. p. 175; emphasis added.)

Brown pointed out various unfair practice matters that do not involve civil service discipline (denial of employee organization rights, bad faith bargaining, employer reprisals not involving civil service discipline) which cannot conflict with or damage SPB's disciplinary jurisdiction (Brown, pp. 196-197) and that,

> (b)ecause no actual jurisdictional conflict between PERB and the State Personnel Board confronts us in this proceeding, we have no

> occasion to speculate on how some hypothetical dispute that might be presented for decision in the future should properly be resolved.
> (29 Cal.3d, p. 200.)

We now leave Brown and come back to the future of the instant case: a civil service dismissal, a matter within the very core of SPB's constitutional authority and jurisdiction. What then is the actual scope and effect of SPB's disciplinary authority and jurisdiction? What authority or jurisdiction, if any, does PERB have over SPB and/or to vitiate or nullify an SPB disciplinary decision?

The SPB's Disciplinary Authority and Jurisdiction

In 1934, the people of the State of California, by an initiative measure, adopted former article XXIV (now art. VII) of the California Constitution, placing the State Civil Service System into the Constitution and constitutionally establishing the State Personnel Board as the tribunal to administer and enforce the civil service statutes, including disciplinary matters. (Cal. Const., art. VII [former art. XXIV]; Nelson v. Dean (1946) 27 Cal.2d 873, 876; Boren v. State Personnel Board, supra, 37 Cal.2d 634, 639.)

Our courts have held that these constitutional provisions vest the final authority as to dismissal and other disciplinary actions in the SPB (as opposed to the employee's "appointing power" or other entity). (Boren v. State Personnel Board, supra, 37 Cal.2d 634, 639; Nelson v. Dean, supra, 27 Cal.2d 873, 876;

Ferdig v. State Personnel Board (1969) 71 Cal.2d 96, 105-106; Ng v. State Personnel Board, supra, 68 Cal.App.3d 600, 605, hg. den.; Payne v. State Personnel Board, supra, 162 Cal.App.2d 679, 684-685, hg. den.; Wylie v. State Personnel Board, supra, 93 Cal.App.2d 838, 843; Leeds v. Gray (1952) 109 Cal.App.2d 874, 880, hg. den.; and see California State Employees' Assn. v. Williams (1970) 7 Cal.App.3d 390, 394, hg. den.)

Likewise, the State Civil Service Act provisions enacted by the Legislature to implement and facilitate article VII (Gov. Code, sec. 18500 et seq.; Byrne v. State Personnel Board (1960) 179 Cal.App.2d 576, 582; Genser v. State Personnel Board, supra, 112 Cal.App.2d 77, 78; Valenzuela v. State of California (1987) 194 Cal.App.3d 916, 920; Kemmerer v. County of Fresno (1988) 200 Cal.App.3d 1426, 1433) establish that it is the SPB which has the authority to determine if cause for civil service discipline exists and, if so, the appropriate degree of discipline, if any, to be imposed (Ramirez v. State Personnel Board (1988) 204 Cal.App.3d 288, 294; Genser v. State Personnel Board, supra, 112 Cal.App.2d 77, 88-90; Gov. Code, secs. 18703 and 19582).

That the actual disciplinary authority and discretion rests with SPB--and not with an employee's "appointing power"--is also confirmed by the courts' actions in cases where civil service disciplinary matters are being remanded for the redetermination of the discipline, if any, to be imposed. The courts remand such matters to the SPB for its redetermination of the discipline, not to the employee's "appointing power." (Shepherd v. State

Personnel Board (1957) 48 Cal.2d 41, 51; Blake v. State Personnel Board, supra, 25 Cal.App.3d 541, 554, hg. den.; Catricala v. State Personnel Board (1974) 43 Cal.App.3d 642, 644; Walker v. State Personnel Board (1971) 16 Cal.App.3d 550, 556, hg. den.; Martin v. State Personnel Board (1982) 132 Cal.App.3d 460, 465-466; Yancey v. State Personnel Board (1985) 167 Cal.App.3d 478, 487; and see Nelson v. Dean, supra, 27 Cal.2d 873, 883.)

As succinctly stated by the California Supreme Court in Boren v. State Personnel Board, supra, 37 Cal.2d 634, 639, emphasis added:

> . . . To obtain responsible control over state employment the civil service system was established by the people. (Const., art XXIV [now art. VII].) The power to discipline employees was largely transferred from various officials and departments to the State Personnel Board. It was contemplated, furthermore, that civil service should be under the board's supervision, to the end that all personnel matters be expertly and uniformly administered. There is no unfairness, therefore, in the fact that plaintiff's rights have been decided in the first instance by the same public agency with which he dealt at the time of his appointment. The position of the State Personnel Board in this respect is not unlike that of the Board of Medical Examiners and other licensing agencies that supervise the granting of licenses, the scope of the activities permitted thereunder, and, when necessary, the disciplining of licensees. [Citations.] . . . and plaintiff is presumed to have known when he joined the civil service that the State Personnel Board is charged by law with deciding all questions of dismissal. (Const., art. XXIV; Gov. Code, sec. 19570 et seq.) . . .

State Civil Service Disciplinary Proceedings

Under the State Civil Service Act, disciplinary action against a civil service employee may be initiated in one of two ways:

(1) by the employee's "appointing power"[6]--or the appointing power's authorized representative—serving on the employee a written notice of the proposed discipline based on one or more of the causes for discipline as specified in the State Civil Service Act, with the written notice being served on the employee at least five calendar days prior to the intended effective date of the proposed action (Gov. code, sec. 19574; SPB Reg. 61[7]); or

(2) by "any person,"[8] with the consent of either the SPB or the appointing power, filing charges with the SPB requesting that disciplinary action be taken by the SPB against a civil

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[6]"'Appointing power' means a person or group having authority to make appointments to positions in the State civil service." (Gov. Code, sec. 18524.) "'Appointment' means the offer to and acceptance by a person of a position in the State civil service in accordance with this part [State Civil Service Act]." (Gov. Code, sec. 18525.) "'Employee' means a person legally holding a position in the State civil service." (Gov. Code, sec. 18526.) In the instant case, the charging party's "appointing power" was the director of the Department of Rehabilitation.

[7]SPB regulations are codified in title 2 of the California Administrative Code.

[8]"Any person" includes: (1) a private citizen, (2) a fellow employee, (3) an appointing power who did not want proceed under Government Code section 19574, and (4) the SPB itself. (Gov. Code, sec. 19583.5; SPB Reg. 62; Power v. State Personnel Board (1973) 35 Cal.App.3d 274, 276; West Coast Poultry Co. v. Glasner (1965) 231 Cal.App.2d 747, 753, hg. den.)

service employee for one or more of the causes for discipline as specified in the State Civil Service Act (Gov. Code, sec. 19583.5; SPB Reg. 62; Power v. State Personnel Board, supra, 35 Cal.App.3d 274, 276).

The most common way that disciplinary proceedings are initiated is that of the "appointing power" serving the employee with a written notice of the proposed adverse action. Such a written notice must be served on the employee at least five calendar days prior to the proposed effective date of the action and:

> . . . shall include: (a) a statement of the nature of the adverse action; (b) the effective date of the action; (c) a statement of the reasons therefor in ordinary language; (d) a statement advising the employee of the right to answer the notice orally or in writing; and (e) a statement advising the employee of the time within which an appeal must be filed. . . .
> (Gov. Code, sec. 19574; SPB Reg. 61.)

This procedure is further implemented by SPB Regulation 61, which prescribes:

> 61. Right to Respond to Charges Prior to Punitive Action
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> At least five calendar days prior to the effective date of any punitive action against an employee with permanent civil service status, the appointing power or any person authorized by it shall give the employee written notice of the proposed action, the reasons for such action, a copy of the charges and material upon which the action is based, and the right to respond either verbally or in writing, to the authority proposing the action prior to its effective date.
> (Cal. Admin. Code, tit. 2, sec. 61.)

The employee may thus respond in writing to the notice and/or have a "Skelly hearing" with the appointing power authority proposing the discipline prior to the effective date of the proposed action, and the appointing power may rescind or modify the proposed action. (Skelly v. State Personnel Board, supra, 15 Cal.3d 194, 215; SPB Reg. 61.)

If the employee does not choose to respond or have a "Skelly hearing," and/or if following any such response or hearing the appointing power does not withdraw or modify the proposed action, the appointing power must file a copy of the notice with the SPB. (Gov. Code, sec. 19574.) Once the matter is filed and pending before the SPB, the appointing power and the employee may not settle or adjust the matter without SPB approval. (Gov. Code, sec. 18681.[9])

Regardless of whether the employee chooses to respond or have a "Skelly hearing," the employee has 20 calendar days from the service of the notice to file a written answer to the notice

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[9]Once an employee has answered the notice and the matter is before SPB, the appointing power and the employee may not settle or adjust the matter without board approval. Government Code section 18681 prescribes (emphasis added):

> Whenever any matter is pending before the Personnel Board involving a dispute between one or more employees and an appointing power and the parties to such dispute agree upon a settlement or adjustment thereof, the terms of such settlement or adjustment may be submitted to the board, and if approved by the board, the disposition of the matter in accordance with the terms of such adjustment or settlement shall become final and binding on the parties.

with the SPB,[10] ". . . which answer shall be deemed to be a denial of all the allegations of the notice of adverse action not expressly admitted and a request for a hearing or investigation as provided in this article [art. 3, Disciplinary Proceedings]." (Gov. Code, sec. 19575.)[11]

Then, in addition to the notice, information and materials the employee has already received in connection with the preliminary written notice and/or the "Skelly" rights (Gov. Code, sec. 19574; SPB Reg. 61; Skelly v. State Personnel Board, supra, 15 Cal.3d 194, 215), comprehensive prehearing discovery rights are afforded the "noticed" employee by Government Code section 19574.1:

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[10]If the employee does not file a written answer to the notice, the discipline becomes final without further SPB proceedings. (See Payne v. State Personnel Board, supra, 162 Cal.App.2d 679, 684-685, hg. den.)

[11]A state civil service employee may raise before the SPB his contention that the "appointing power": (1) did not initiate the disciplinary action for cause, but, rather, as a reprisal for the employee's exercise of SEERA rights; and/or (2) that the proposed level or degree of discipline was selected by the appointing power because of the employee's exercise of SEERA rights and, accordingly, is discriminatory, disparate or excessive. (Gov. Code, sec. 18500, subds. (c)(4) and (5); and see Robinson v. State Personnel Board (1979) 97 Cal.App.3d 994, 998, 1003-1004, hg. den.; Constancio v. State Personnel Board (1986) 179 Cal.App.3d 980, 988; Goggin v. State Personnel Board (1984) 156 Cal.App.3d 96, 107, hg. den.)

Should the SPB determine that the proposed discipline is discriminatory, disparate or excessive, the SPB may impose an appropriate lesser degree of discipline, or no discipline at all. (Gov. Code, secs. 18500 and 19582; Ramirez v. State Personnel Board, supra, 204 Cal.App.3d 288, 294; Genser v. State Personnel Board, supra, 112 Cal.App.2d 77, 88-89; Wylie v. State Personnel Board, supra, 93 Cal.App.2d 838, 841.)

> (a) An employee who has been served with a notice of adverse action, or a representative designated by the employee, shall have the right to inspect any documents in the possession of, or under the control of, the appointing power which are relevant to the adverse action taken or which would constitute "relevant evidence" as defined in Section 210 of the Evidence Code. The employee, or the designated representative, shall also have the right to interview other employees having knowledge of the acts or omissions upon which the adverse action was based. Interviews of other employees and inspection of documents shall be at times and places reasonable for the employee and for the appointing power.
>
> (b) The appointing power shall make all reasonable efforts necessary to assure the cooperation of any other employees interviewed pursuant to this section.

There are further extensive statutory provisions affording an employee the right to first petition the SPB to compel discovery if there is a failure or refusal by the appointing power to comply with Government Code section 19574.1 discovery, and, if the petition is not granted by the SPB, the employee may then file a petition to compel discovery in the superior court. (Gov. Code, sec. 19574.2.) In addition, an employee may obtain evidence for the hearing by deposing others. (Gov. Code, sec. 19580.)[12]

After prehearing discovery is completed, a formal adjudicatory hearing is held before an ALJ of the SPB. The ALJ

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[12]It is noteworthy that such extensive prehearing discovery and other rights afforded to a civil service employee, in connection with a civil service disciplinary action, are <u>not</u> afforded nor available to a charging party in an unfair practice proceeding before PERB.

then submits a proposed decision containing findings of fact and a designated discipline, if any, to the SPB itself. The SPB may then adopt the proposed decision in its entirety as its decision, or it may reduce the discipline set forth in the proposed decision and adopt the balance of the proposed decision as its decision. (Gov. Code, secs. 19578 and 19582.) Should the SPB not adopt the proposed decision, it must decide the case itself upon the record, including the transcript of the hearing and the exhibits, and may take additional evidence itself or assign the case to the same or a different ALJ to take additional evidence. The SPB must also afford the parties the opportunity to present oral and written argument to it before deciding the case itself. (Gov. Code, sec. 19582.)

"In arriving at a decision, or a proposed decision," the SPB or its ALJ may consider any prior suspension or suspensions of the employee under any appointing power, or any other prior disciplinary proceedings under the disciplinary proceedings article of the State Civil Service Act. (Gov. Code, sec. 19582, subd. (d).)

The SPB itself must render (or adopt) a decision "which in its [SPB] judgment is just and proper." (Gov. Code, sec. 19582, subd. (a), emphasis added; Cal. Const., art. VII, sec. 3; Wylie v. State Personnel Board, supra, 93 Cal.App.2d 838, 841.)

If discipline is imposed by the SPB's decision, an employee may seek a rehearing before the SPB (Gov. Code, secs. 19586-19587) and/or may seek judicial review of the SPB decision by

way of a writ of review (certiorari)[13] or administrative mandamus (Boren v. State Personnel Board, supra, 37 Cal.2d 634, 637-638; Code of Civil Procedure, secs. 1067-1070, 1094.5)[14].

Should a reviewing court determine that one or more of the grounds for imposing the discipline is not supported by the record, and/or that the SPB has abused its discretion as to the degree of discipline it imposed, the case is remanded to the State Personnel Board--not to the appointing power--to redetermine the discipline to be imposed, if any, on the employee. (Shepherd v. State Personnel Board, supra, 48 Cal.2d 41, 51; Blake v. State Personnel Board, supra, 25 Cal.App.3d 541, 554, hg. den.; Catricala v. State Personnel Board, supra, 43 Cal.App.3d 642, 644; Walker v. State Personnel Board, supra, 16 Cal.App.3d 550, 556, hg. den.; Martin v. State Personnel Board, supra, 132 Cal.App.3d 460, 465-466; Yancey v. State Personnel Board, supra, 167 Cal.App. 3d 478, 487; and see Nelson v. Dean, supra, 27 Cal.2d 873, 883.)

Unless the courts subsequently annul or set aside the SPB decision, certain legal and jurisdictional effects attend a dismissal imposed by the SPB.

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[13]The SPB is a "constitutional agency" invested with judicial powers by the State Constitution. (Shepherd v. State Personnel Board, supra, 48 Cal.2d 41, 46-47; Ferdig v. State Personnel Board, supra, 71 Cal.2d 96, 105; Flowers v. State Personnel Board (1985) 174 Cal.App.3d 753, 758, hg. den.)

[14]In the instant case, the record shows that Moore sought and had judicial review of the SPB decision dismissing him from his civil service position. The court upheld the SPB's dismissal and denied Moore a peremptory writ.

Once the SPB has rendered its decision dismissing an employee from his or her civil service position, the SPB must enter the dismissal upon its minutes and the official roster (Gov. Code, sec. 19583), and under the mandatory provisions of Government Code section 19583.1 (emphasis added):

> Dismissal of an employee from the service shall, unless otherwise ordered by the board [SPB]:
>
> (a) Constitutes a dismissal as of the same date from any and all positions which the employee may hold in the state civil service.
>
> (b) Result in the automatic removal of the employee's name from any and all employment lists on which it may appear.
>
> (c) Terminate the salary of the employee as of the date of dismissal except that he shall be paid any unpaid salary, and paid for any and all unused and accumulated vacation and any and all accumulated compensating time off or overtime to his credit as of the date of dismissal.

Thus, a dismissal by the SPB not only effects a dismissal from any and all civil service positions the employee may hold, but it also automatically removes the employee from all civil service employment lists,[15] and, absent the annulment of the SPB's decision by a court on review, the SPB is without jurisdiction

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[15]Government Code section 18537 of the State Civil Service Act prescribes:

> "Employment list" means preferred limited-term list, limited-term list, eligible list, departmental eligible list, subdivisional promotional list, departmental promotional list, multidepartmental promotional list, servicewide promotional list, departmental reemployment list, subdivisional reemployment list and general reemployment list.

to restore a dismissed employee's name to the civil service employment lists. (See 20 Ops.Cal.Atty.Gen. 251, 255 (1952).)[16]

Also--and of major significance with respect to PERB cases of the instant type involving an "appointing power" (not the SPB)--an SPB dismissal precludes reinstatement by an appointing power of such a dismissed employee. (Gov. Code, secs. 19140-19141.)

From the foregoing it is evident that, in state civil service dismissal cases, while an "appointing power" may initiate and tentatively impose a civil service dismissal, it is not the appointing power but the State Personnel Board which is the actual entity that is constitutionally and statutorily vested with the jurisdiction and final authority to determine not only if there is cause for discipline under the State Civil Service Act, but also what discipline, if any, ±±, (SPB) will impose under the State Civil Service Act.[17]

Moreover, when SPB has determined that cause for civil service discipline exists and that the appropriate discipline in the case is dismissal, the resultant effect of said dismissal

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[16]In addition, should a dismissed employee attempt to regain eligibility for reappointment from an eligible list through examination and qualifying anew, the SPB may refuse to: (1) examine the person; (2) declare the person eligible; or (3) certify the person for appointment. (Gov. Code, sec. 18935.)

[17] Hence, in the instant case, the final disciplinary action of dismissal as to Moore was not by the Director of the Department of Rehabilitation, nor by the respondent Department of Personnel Administration, it was by the State Personnel Board, an entity which was not a party to this unfair practice proceeding and an entity over which PERB does not have jurisdiction.

by the SPB—absent a judicial reversal of the SPB decision--is an irreversible dismissal of the employee from his or her civil service position and the cessation, by operation of law, of the dismissed employee's eligibility for reinstatement or reappointment by any appointing power.

Accordingly, with regard to state civil service dismissal cases, PERB has no jurisdiction over the SPB, which makes the final decision to impose dismissal. Moreover, with respect to the "appointing powers" (herein, the Department of Rehabilitation), over which PERB does have jurisdiction, such parties have no authority or power to reinstate, reappoint or restore such a dismissed employee should PERB attempt to order them to do so. PERB is simply without "effective jurisdiction" to render any kind of meaningful remedy to such a dismissed state civil service employee, and, hence, is without jurisdiction. (Abelleira v. District Court of Appeal (1941) 17 Cal.2d 280, 288, 290; Corona Unified Hospital District v. Superior Court (1964) 61 Cal.2d 846, 852; Fortenberry v. Superior Court (1940) 16 Cal.2d 405, 407-408.)

In summary, the charge and complaint in this case should have been dismissed because of PERB's lack of effective jurisdiction in a matter involving a state civil service dismissal and the State Personnel Board.[18]

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[18]With respect thereto, this Board should not be expending its and the parties' time, efforts and resources on a matter over which it does not have effective jurisdiction.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

JAMES ALIN MOORE,	)	Unfair Practice
	)	Case No. SF-CE-85-S
	)	
v.	)	
	)	
STATE OF CALIFORNIA (DEPARTMENT OF PERSONNEL ADMINISTRATION),	)	PROPOSED DECISION (7/28/88)
	)	
Respondent.	)	

Appearances: James Alin Moore, on his own behalf; Kenneth R. Hulse, Labor Relations Counsel, for the State of California (Department of Personnel Administration).

Before Fred D'Orazio, Administrative Law Judge.

PROCEDURAL HISTORY

This unfair practice charge was filed by James Alin Moore (hereafter Moore or Charging Party) against the State of California (Department of Personnel Administration) (hereafter Respondent) on August 12, 1987. The charge alleges that the Charging Party was disciplined and eventually terminated because he engaged in conduct protected by the Ralph C. Dills Act (hereafter Act). Respondent's conduct, it is alleged, in the charge, violated sections 3519(a) and (b) of the Act.[1]

[1]The Act is codified at Government Code section 3512 et seq. Unless otherwise indicated, all statutory references in this decision are to the Government Code. Sections 3519(a) and (b) provide that it shall be unlawful for the State to:

> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to

The Public Employment Relations Board (hereafter PERB or Board) General Counsel issued a complaint on August 24, 1987. Respondent filed its answer on September 11, 1987, denying that it violated the Act and offering several affirmative defenses. Denials and defenses will be dealt with below as appropriate.

The settlement conference on September 24, 1987 did not resolve the dispute. A formal hearing was conducted by the undersigned in San Francisco on March 21, 22, and 23 and on April 11, 1988. The post-hearing briefing schedule was completed on June 20, 1988.

FINDINGS OF FACT

THE SEXUAL HARASSMENT CASES AND THE STATE PERSONNEL BOARD PROCEEDING

James Alin Moore was employed in the Department of Rehabilitation's (hereafter Department) Santa Cruz office as a vocational rehabilitation counselor. In that position he counseled persons with physical and mental disabilities who experienced difficulty obtaining suitable employment.

Based on two unrelated sexual harassment complaints, Moore received a formal reprimand on February 20, 1986 and was

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> discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.

dismissed effective July 15, 1986. He unsuccessfully appealed both adverse actions to the State Personnel Board (SPB). A capsulized version of the conduct which led to these adverse actions is as follows.[2]

The formal reprimand accused Moore of sexually harassing Celia Cardenas, a Santa Cruz County employee whom Moore worked with on behalf of a client. In addition to offensive comments, Moore engaged in unwelcome touching of Cardenas, and on one occasion while in a car during work hours he placed his hand on her thigh and held it there, pressing down. This conduct was reported to Moore's supervisor, Kenneth Miller. The investigation which followed will be discussed in detail below.

Moore was later discharged for engaging in similar conduct with Karen Cooper, also a vocational rehabilitation counselor in the Santa Cruz office. In addition to numerous sexually suggestive comments, there were several incidents. Cooper came to work on Halloween dressed as a Hell's Angel. At one point during the day when Moore and Cooper were alone he told her she looked great, reached his hands inside her jacket and felt her breasts. Moore then placed his hands on Cooper's hips and tried to pull her close. Later that same day Moore placed his hand on Cooper's pelvic area as they walked along.

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[2]This brief description of the events which led to Moore's initial discipline and eventual dismissal is taken from the decision of the State Personnel Board administrative law judge (ALJ), rendered after a hearing on both issues.

A few days later Cooper agreed to have lunch with Moore with the intention of confronting him about his behavior. She did so, without apparent success, for as the lunch ended Moore leaned across the table, grabbed her forearms and kissed her on the mouth.

During another incident in the mailroom, Moore pulled Cooper close, gave her a hug and uttered a sexual innuendo. A similar incident occurred after a District staff meeting. As the meeting ended, Cooper hugged a friend while saying goodbye. Moore saw this and asked for a hug. When Cooper refused Moore pulled her close, draped his hands over her buttocks and bent her over backwards while hugging her tightly

Cooper eventually filed a sexual harassment complaint against Moore. The investigation of the complaint is more fully discussed below.

Moore appealed the letter of reprimand and the discharge to the State Personnel Board. A hearing was held on October 24, November 21, and December 12, 1986 before a State Personnel Board administrative law judge.

The decision of the administrative law judge was issued on April 21, 1986. With respect to the Cardenas case, the administrative law judge concluded that Moore's "offensive conduct . . . constituted discourteous treatment of the public or other employees and was a failure of good behavior during duty hours of such a nature that it caused discredit to the Department of Rehabilitation and to [Moore's] employment as a

Vocational Rehabilitation Counselor."

With respect to the Cooper case, the administrative law judge concluded that Moore's conduct "constituted discourteous treatment of the public or other employees, was a failure of good behavior either during or outside of duty hours of such a nature that it caused discredit to the Department of Rehabilitation and to [Moore's] employment as a Vocational Rehabilitation Counselor, and constituted unlawful sexual harassment against another employee while acting in the capacity of a State employee."

In reaching these conclusions, the administrative law judge found the complaining witnesses credible. He found they convincingly painted a "consistent picture of blatantly offensive conduct" on the part of Moore. "In both cases," the *ALJ* concluded, Moore "made repeated attempts to interest the women in a sexual relationship despite their expressed lack of interest in any such relationship." The testimony of Moore contesting the charges was summarily rejected by the Personnel Board's ALJ.

The State Personnel Board, on May 5, 1987, adopted the findings and conclusions of the administrative law judge, and *on* July 21, 1987 denied a petition for rehearing. As of the close of the hearing in this case, the Santa Cruz County Superior Court, Case Number 104046, had denied Moore's Petition For Writ Of Mandate, Prohibition Or Other Appropriate Writ.

COLLATERAL ESTOPPEL

Prior to the hearing in this matter the Respondent filed a motion seeking application of the doctrine of collateral estoppel to preclude relitigation of issues already determined by the State Personnel Board.[3] Respondent, in its motion, relied on the record in the SPB proceeding which was entered in evidence in the PERB hearing.

As was pointed out in State of California (Department of Developmental Services) (1987) PERB Decision No. 619-S, the doctrine of collateral estoppel obviates the need to relitigate issues already adjudicated in a prior action. The purpose of the doctrine is to promote judicial economy by minimizing repetitive litigation, to prevent inconsistent judgments which undermine the integrity of the judicial system, and to protect against vexatious litigation. Lockwood v. Superior Court (1984) 160 Cal.App.3d 667, 671, 206 Cal. Rpt. 785. The

[3]Respondent also moved to defer this dispute to binding arbitration. Although the memorandum of understanding between the State and American Federation of State, County and Municipal Employees (AFSCME) covering Unit 19 provides for binding arbitration of reprisal claims, the motion was denied. The contract provides that only AFSCME has the right to proceed to arbitration; AFSCME refused to do so in Moore's case. Therefore, it was concluded that it would be "futile" to pursue contractual remedies. See section 3514.5(a) (2); State of California (Department of Developmental Services) (1985) PERB Order No. Ad-145-S; State of California (Department of Corrections) (1986) PERB Decision No. 561-S. In a related unfair practice case Moore unsuccessfully charged AFSCME with a breach of the duty of fair representation for refusing to take his case to arbitration. James Alin Moore v. American Federation of State. County and Municipal Employees, Local 2620 (1988) PERB Decision No. 683-S.

Board will give collateral estoppel effect to administrative decisions made by an agency (1) acting in a judicial capacity, (2) to resolve properly raised disputed issues of fact where, (3) the parties had a full opportunity to litigate those issues. State of California (Department of Developmental Services), supra, PERB Decision No. 619-S; see also People v. Sims (1982) 32 Cal.3d 468, 168 Cal.Rptr. 77; Frommagen v. Board of Supervisors (1987) 197 Cal.App.3d____Cal.Rptr.____.

All of these requirements are met here with respect to certain issues. The SPB, acting in a judicial capacity, fully considered whether Moore actually engaged in the offensive conduct described above and, if so, whether the Department of Rehabilitation had sufficient reasons to terminate him. The SPB answered both questions in the affirmative. The hearing was recorded and a transcript prepared. Both parties had the opportunity to call and examine witnesses and to present other documentary evidence. Moore was represented by Richard Sharpe, a representative of the American Federation of State County and Municipal Employees, the exclusive representative of Unit 19, Health and Social Services/Professional, the unit in which Moore was formerly employed. The State was represented by Deputy Attorney General Calvin Wong.

Applying the principles of collateral estoppel set forth above, and in the interest of seeking an "administrative accommodation" between PERB and the SPB, the undersigned issued a ruling precluding relitigation of those issues earlier

decided by the Personnel Board. Pacific Legal Foundation v. Brown (1981) 29 Cal.3d 168, 200, 172 Cal.Rptr. 487. Accordingly, Charging Party was not permitted in this unfair practice hearing to relitigate the issues concerning whether he actually engaged in the offensive conduct described above, and, if so, whether that conduct constituted sufficient reason to terminate.

There are, however, other issues central to the resolution of any discrimination/retaliation complaint before PERB which were not litigated during the SPB proceeding. Issues concerning Moore's protected conduct and unlawful motivation on the part of employer agents were not even mentioned during that proceeding. The SPB was concerned primarily with the issue of cause for termination and not with the separate issue of underlying motivation. Therefore, the doctrine of collateral estoppel cannot be applied to the latter issue. "As in any mixed-motive case, the employer's conduct is unlawful when, despite employee misconduct, the evidence demonstrates that the employer would not have elected to discipline the employee as it did but for the employee's union activity." State of California (Department of Transportation) (1984) PERB Decision No. 459-S, p. 9. During the PERB hearing, consequently, Moore was given the opportunity to show that, notwithstanding the conclusions reached by the SPB, he would not have been disciplined and/or discharged "but for" his protected activity. Novato Unified School District (1982) PERB Decision No. 210.

MOORE'S PROTECTED ACTIVITY

In October 1985 Moore was elected chairperson of AFSCME's Rehabilitation Occupational Committee (ROC), a statewide office. Charlie Meigs, District Administrator for the San Jose District, congratulated him on his election. Among other things, the ROC chairperson communicates with employees in occupational classifications, gives input to the negotiating team, involves employees on issues affecting their work, and monitors legislation affecting job classifications.

On December 20, 1985, Moore wrote to Director Cecilia Fontanoza, announcing his election as ROC chairperson, and stating his concern about the Department's practice of hiring limited term employees. Robert Hawkins, Labor Relations Officer, responded on behalf of Fontanoza on January 13, 1986. Thus, both Fontanoza and Hawkins had notice of Moore's status as ROC chairperson.

In January 1986, Moore distributed a flyer on AFSCME stationery at all work sites. The flyer announced an upcoming ROC meeting, and listed the issues to be discussed at the meeting. They were, among others, status of limited term employees, production standards, computerization and contracting out. As "possible strategies" for dealing with these issues, the flyer suggested using a "telephone tree" and "production slowdown." Several other flyers announcing ROC meetings to consider similar issues were sent out by Moore during the first half of 1986. The last ROC meeting attended

by Moore was in July 1986, at approximately the same time he was charged with sexual harassment.

In his capacity as ROC chairperson, Moore also became involved in budgetary issues. On May 8, 1986, he wrote to State Senator Bill Greene seeking to present information to Senate and Assembly subcommittees concerning proposed budget cuts which would adversely affect staffing in the Department of Rehabilitation. Moore attached a petition, signed by several employees, appealing to the Legislature to support AFSCME's effort to maintain and improve rehabilitation services. Earlier, on March 12, 1986, Moore had sent a similar letter to the Assembly Ways and Means Committee setting forth AFSCME's, position on, among other things, subcontracting of agency work and budgetary concerns.

On May 9, 1986, Moore attended a meeting where Merrill Jacobs, the Department's chief deputy director, was the main speaker. Also in attendance were about twelve employees and Charlie Meigs. Since Moore viewed this meeting as pivotal, it will be considered in some detail.

According to Moore, he openly disagreed with Jacobs's assessment of a computerization pilot project in Los Angeles. AFSCME and management had disagreements about how computerization was to accomplished, and Moore had earlier visited Los Angeles as an AFSCME representative to evaluate the project. Moore felt computerization was used as a "management tool to track counselors" rather than as a "tool to help

counselors in helping clients." In any event, Moore and Jacobs had an exchange of words, described by Moore as a "standoff." Moore recalled a "considerable amount of animosity and electricity in the air."

Jacobs, called as an adverse witness by the Charging Party, testified that he recalled the May 9 meeting and the general discussion about the pilot project in Los Angeles. However, he could not recall an expression of dissatisfaction by Moore about the project. In his view, the heated exchange described by Moore simply did not occur.

Karen Mandel, a vocational rehabilitation counselor called to testify by the Charging Party, also was at the meeting. She too recalled that a discussion regarding computerization in Los Angeles occurred, but she had no recollection of any "major clashes of anger or conflict." In her view, the meeting was "unremarkable."

Based on the foregoing testimony, it is concluded that Moore, an AFSCME representative active in the computerization issue, attended the May 9 meeting. He participated in a discussion about computerization, as well as other subjects. However, it is also concluded that there was no "standoff" between Moore and Jacobs, and the perception that the air contained a "considerable amount of animosity and electricity" was held only by Moore. In reaching this conclusion, I find it significant that Mandel, called to testify on Moore's behalf, could recall no standoff. Her recollection was similar to that expressed by Jacobs.

In June 1986 Moore, along with several other employees, signed a petition seeking the reinstatement of John Clute, an employee who had abruptly resigned amidst a series of personal and work-related problems. The petition was submitted to Meigs, who had earlier counselled Clute not to resign on the spur of the moment. Due to a deficient overall work record, Meigs had earlier told Clute, he might not be welcomed back if he had a change of mind.

On June 20, 1986 Moore wrote to Helen Martin, Assistant Deputy Director for the Department's Southern Region, seeking confirmation from her of a rumor that production standards for counselors had been increased unilaterally. If true, Moore wrote to Martin, the increase would violate the Memorandum of Understanding between AFSCME and the State. He requested a written response. Martin responded on June 30, 1986, assuring Moore that new standards had not been promulgated and that no individual counselor standards existed. Both Meigs and Ferd Shaw, the Department's deputy director for field operations, were aware of this exchange of letters. It was Shaw who instructed Martin to respond.

The Charging Party insists that the subject of production standards was of the highest importance to both the Department of Rehabilitation and AFSCME. His protected conduct in this crucial area, he contends, so annoyed and angered Department representatives that, more than any other activity, it provided

the underlying motivation for the adverse actions he suffered. Because of the weight placed, on this subject by the Charging Party, testimony concerning production standards wi11 be considered in detail.

Rene Bloch, a counselor and AFSCME steward in San Jose, supported Moore's testimony that the production standards issue was of great importance. Bloch testified that production standards caused a "constant battle," and was "the biggest issue probably." In 1979 or 1980, according to Bloch, counselors refused to submit production statistics to the Department as a form of protest, and the disagreement around this issue has persisted over the years. Mandel also supported Moore's testimony about the importance of production standards, but when pressed she could give no reasons for her opinion.

On the other hand, four management representatives, called by the Charging Party to testify as adverse witnesses, described somewhat different views. Meigs explained that the production goal is 2.2 "rehabilitations" per month, or twenty six per year.[4] However, while this standard has been in effect for several years, it is not a rigid standard. It can be adjusted according to prevailing circumstances or overall caseload of the individual counselor. Meigs testified that production standards is not a particularly significant issue.

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[4]A "rehabilitation" is a client or disabled person who has been gainfully employed for a minimum of six months.

He has talked to the local AFSCME steward about it, but there have been no major disputes.

Kenneth Miller, Moore's immediate supervisor until June 1986, also admitted that production standards was an important issue, and employees were occasionally recognized for high production. But he too said the goals were not rigid; they were discussed between individual employees and their supervisors and were subject to modification. There were no adverse actions taken against employees for low production. Ferd Shaw and Elizabeth Solstad, the Department's chief counsel, corroborated the testimony of Meigs and Miller.

Based on the foregoing, I conclude that production standards or goals was an on-going subject of discussion between AFSCME and the Department. However, like many other employment-related issues, it carried no particular significance. It was simply another ordinary labor-management issue to be dealt with.[5] The testimony of the management witnesses to this effect is underscored by the absence of any significant incidents related to disputes regarding the subject. No employees were treated adversely as a result of maintaining low standards. There is no evidence that the

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[5]This conclusion should not be read to diminish the importance of production standards. It has its importance. However, there is simply no sound reason to elevate its importance to a status which compels or even suggests that Moore's activity in this area was more likely to prompt the Department to undertake the adverse actions at issue here.

negotiations concerning this subject were heated. Although the matter was covered in the collective bargaining agreement, no grievances were filed. Nor was the Department charged with unfair practices connected to the subject. Bloch referred to a protest, but it was remote in time, having occurred in 1979 or 1980, long before Moore began work in the Department.

THE ADVERSE ACTIONS

The Letter of Reprimand

On November 25, 1985, Celia Cardenas, a Santa Cruz County employee, complained in writing to her supervisor, Allan Knox, that Moore had sexually harassed her during a field visit to a private sector employer. In a letter dated December 12, 1985, Knox reported the incident to Kenneth Miller, Moore's immediate supervisor at the time.

Upon receipt of the complaint, Miller met with Moore, intending to reprimand him. After meeting with Miller, Moore drafted an apology, dated December 17, 1985, to Cardenas. Miller then prepared a long memo to Moore, dated December 18, 1985, in which he described in detail the Cardenas complaint and his discussion with Moore during the meeting, including Moore's version of the incident. The memo also reminded Moore of his responsibilities as a State employee and ended with a statement of Miller's hope that "this will be the last incident of such a nature reported to me. In the event that further incidents should occur, I will recommend to the Department that more formalized action be taken." But this did not end the matter.

On December 18, 1985 Miller reported the complaint to his immediate supervisor, Charlie Meigs. Meigs was annoyed because he thought the incident was serious and therefore Miller should have called him earlier. He told Miller so. He also told Miller that individuals more experienced with this type of complaint should have the opportunity, to review the case. Accordingly, Miller was instructed by Meigs to forward all information to him.[6] While Miller ceased any further activity on the case, he testified that as of that time his investigation was complete.

Charging Party here sees an unlawfully motivated attempt by Meigs to take the investigation out of Miller's hands. I do not see it that way. It is true that Meigs was justifiably concerned about the seriousness of the charges and also was not happy with the investigation. But it appears that he merely told Miller the incident was reported late, and he directed that the relevant information be forwarded so more experienced people could review it. Since Miller's investigation had ended, the entire matter passed to Meigs[1] level. There is nothing remarkable in this turn of events.

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[6]The information given to Meigs was: (1) Cardenas' complaint to Knox; (2) Knox' letter to Miller; and (3) Miller's summary of his meeting with Moore, including Moore's version of the incident.

Meigs was not satisfied with the material he received from Miller. He thought the apology insincere and the penalty suggested by Miller in his December 15, 1985 memo to Moore too light. Meigs testified that it was a "slap on the wrist" for a serious offense.

After reviewing the written material, Meigs consulted with Joe Brown, civil rights officer, Bob Hawkins, employee relations officer, and Ken Englebach, Meigs's immediate supervisor. Meigs did not talk directly with Moore or Cardenas. However, he had reviewed Moore's account of the incident, as presented by Miller in the December 15, 1985 memo, as well as Cardenas' version of the complaint, as presented in her earlier memo to her supervisor, Allan Knox.

On December 19, 1985, Meigs recommended to the personnel office that Moore be given a formal reprimand and required to write a sincere letter of apology. In formulating this recommendation, Meigs found "most damaging" Moore's inability to recall several of the so-called touching aspects of the complaint. Miller had recorded, in his December 18 memo, Moore's inability to recollect.

Meigs' recommendation was accepted. The second letter of apology satisfied Meigs and was sent by Moore to Cardenas on January 30, 1986. On February 11, 1986, Englebach formally reprimanded Moore.

The Letter of Termination

On June 26, 1986, Karen Cooper approached her immediate

supervisor, Robert Stoll, (Stoll had recently replaced Miller), and informed him of her complaints against Moore and of her unsuccessful attempts to get him to stop the offensive behavior. Stoll explained the right to file a formal complaint, but he advised that she should be certain before doing so. A formal complaint, Stoll explained, would require..... her to confront Moore directly with the allegations of sexual harassment, potentially a difficult task. He suggested that she think about it carefully over the weekend before reaching a final decision.

The following week Cooper told Stoll she had decided to file the formal complaint. Being new to the office, Stoll contacted Meigs. In a meeting that day with Stoll and Meigs, Cooper again presented her allegations against Moore. Meigs told Cooper he thought she had a valid case, and he "encouraged" her to file a formal complaint. He did not contact Moore to learn his side of the story before providing his encouragement.

Civil Rights Officer Joe Brown was called immediately and told by Cooper that she wanted to file a formal complaint. Soon thereafter Meigs reported the events to his immediate supervisor, Ken Englebach, who told Meigs to conduct an investigation. Meigs then called the personnel office to initiate an investigation.[7]

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[7] On about July 7 Meigs talked again with Englebach and the subject of dismissal "came up." Englebach told Meigs that,

By June 30, 1986 Stoll had informed Moore of Cooper's complaint. Shortly thereafter, on July 1, 1986, Stoll directed Moore in writing to have no further contact with Copper. Moore was placed on administrative leave, effective July 18, 1986 and was terminated July 25, 1986.[8]

Meanwhile, Cooper's complaint was investigated by two people, Personnel Analyst Russ Enyart and Civil Rights Officer Joe Brown. The civil rights officer is charged with the duty to investigate formal complaints of discrimination or sexual harassment. The personnel analyst's duty is to investigate possible adverse actions. This was the first case in which a so-called dual investigation was employed.[9]

Enyart interviewed Meigs on July 2, 1986. The next day he went to Santa Cruz and interviewed Cooper and Stoll. Enyart also interviewed other employees in Santa Cruz. Chris Smart, a vocational rehabilitation counselor, told Enyart he saw Cooper displaying "avoidance action trying to stay away from Jim."

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in his view, dismissal was appropriate if the allegations against Moore were substantiated. Meigs played no further role in Moore's dismissal. He went on vacation and while he was gone Moore was dismissed.

[8]Stoll was not aware of Moore's protected conduct, having become Moore's supervisor only about one month prior to Moore's termination.

[9]Neither Enyart nor Brown worked in Santa Cruz. Because of the sensitive nature of the complaint, Englebach and Larry Kerosec, chief of personnel, concluded that persons from outside the Santa Cruz office should investigate.

Marilyn Mendoza, also an employee, told Enyart that at a meeting she saw Moore "get a hold of or grab Karen and Karen wrest away from him and move out very quickly" in an "angry-like" manner. Enyart interviewed four other Department employees and one county employee. Except for the county employee, who refused to talk to Enyart, the record does not clearly establish what response the others gave Enyart.[10]

On July 7, 1986, Enyart reported his findings to Kerosec. Under Kerosec's direction, Enyart then prepared a draft of a letter of adverse actions against Moore. The penalty part of the letter, however, was left blank. Enyart had not interviewed Moore as of this time.

On July 8 and 9 Brown conducted his part of the investigation. He interviewed or attempted to interview fourteen people.

Brown first interviewed Cooper, who presented a detailed account of the allegations against Moore. Brown next talked to Moore. In essence, according to Brown's final written report and his testimony at the hearing, Moore denied some of Cooper's allegations and could not recall crucial facts concerning others. The precise nature of other allegations was disputed.

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[10]The responses received by Enyart and Brown during the course of the investigations are not relied on here for the truth of the matters stated. Rather, they are set forth here to show the nature of the respective investigations and the responses received.

For example, Cooper claimed Moore forcibly kissed her on the mouth in a restaurant. Moore described it as a friendly birthday kiss.

Brown contacted twelve other witnesses. Mendoza corroborated Cooper's allegation that Moore committed an "unwelcome physical touching" at a meeting. The remaining eleven individuals contacted were not particularly helpful. According to Brown, they told him they did not want to "get involved."

On July 11, 1986, Kerosec, Solstad, Englebach, Brown and Enyart met to discuss the allegations against Moore. Both Brown and Enyart had completed their investigations, but Brown had not yet written his final report.[11] As the Department's attorney, Solstad was concerned that any adverse action proposed against Moore could withstand attack on appeal.

There was a general discussion concerning the two investigations, the specific facts surrounding the Cooper complaints, and the earlier letter of reprimand. Brown, in response to questions by Solstad, reported that Moore was equivocal when responding to the allegations. Cooper was more credible, he reported. Brown told those at the meeting that Moore's responses to Cooper's allegations "left something to be

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[11]Brown completed the written report at a later date. Based on the final written report, Director Cecelia Fontanoza, in August 1986, upheld Cooper's complaint of sexual harassment.

desired." He described Moore as "vacillating" while responding to questions about what happened between Moore and Cooper.

Enyart painted a similar picture of Cooper. He told those present that during his investigation he found Cooper "believable." The reports by Enyart and Brown satisfied Solstad that any adverse action against Moore could withstand appellate attack.

There was no mention during the meeting of Moore's protected activity. All participants convincingly testified that they were not even aware of the activity at the time of the meeting.

During the course of the meeting, Solstad, Kerosec and Engleback eventually reached the decision to recommend Moore's termination. Since Enyart and Brown were not cast in the roles of management decision-makers, they were not asked for their recommendations. However, neither registered an objection to the decision to recommend termination.

Ferd Shaw eventually signed the letter of termination, but in doing so it appears that he merely concurred in the recommendation which emerged from the July 11, 1986 meeting.[12] Shaw was aware of the Cooper case, but there is no evidence that he played any role in the investigations or in the formulation of the recommendation. Englebach had kept Shaw

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[12]The parties stipulated that Tom Burns, deputy director of administration, also reviewed the letter of termination and approved it. The stipulation also recognizes that Burns had no unlawful motive.

informed of the status of the investigation, but there is no evidence that Merrill Jacobs, Shaw's immediate supervisor, or any others higher in the managerial hierarchy were kept abreast of the ongoing developments relating to the complaint.

DISPARATE TREATMENT

The Charging Party's argument that he was treated in a disparate fashion is based primarily on a comparison of his case with the Lynn Kageyama-Larry Payton case. Both Kageyama and Payton are counselors is the Santa Cruz office who had lived together for several years. In February 1984 they stopped living together and ended their relationship. The break-up was at times bitter and the effects spilled over into the Santa Cruz office.

The Kageyama-Payton affair was so disruptive that supervisor Ken Miller, on May 15, 1984, issued a memo, captioned "office protocol," setting forth a list of rules to enable Kageyama and Payton to deal with each other when in the office.[13] Kageyama and Payton saw a therapist together during 1984, but their relationship, at least at work, did not improve during 1984 and most of 1985.

In May 1985 Meigs met with Kageyama and discussed her allegations against Payton. As he did in the Cooper case, Meigs encouraged her to file a formal complaint. Meigs

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[13]The list included eight rules. For example, face to face communication was to be limited, personal business was to be handled during nonwork time, no shouting was allowed, etc.

immediately called Joe Brown and Kageyama talked to Brown. During their conversation Brown scheduled an appointment with Kageyama.

On July 17, 1985, Kageyama wrote a lengthy memo to Brown detailing a "summary of harassment that has occurred on the job" between January 12, 1984 and May 22, 1985. The memo was not a formal complaint which asked Brown to investigate. The language in the memo indicates that Kageyama sought only to have the document placed in her personnel file.

Kageyama raised thirty five separate incidents in the memo.[14] Many of the early allegations appear to be the result of arguments or confrontations between two people in the process of ending a long relationship. Later, however, the allegations became more serious. For purposes of evaluating Charging Party's disparate treatment argument, a summary of the relevant allegations is set forth here.

Kageyama wrote to Brown that, in February 1984, Payton tried to hug her after attempting to give her a copy of a premarital agreement; he hugged her again in August 1984. The memo also stated that, in July 1984, Payton threatened to kill Kageyama because he suspected her of having an affair with a co-worker. At a March 6, 1985 meeting Payton directed "insulting sexual innuendos" to Kageyama. Payton was accused

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[14]The memo was received into evidence to show only the existence of Kageyama's allegations against Payton and the length of time they were outstanding. The memo was not received to show the truth of the allegations.

of calling her on the office intercom and breathing heavily into the phone. Kageyama said Payton physically blocked her from passing by him in a hallway, and he made attempts to gain access to her home telephone number and address.

Kageyama also charged Payton with acts she suspected he committed but could not prove. For example, her car was damaged but she had no evidence that Payton did it. On several occasions she arrived at work to find that someone had urinated in her office, but could produce no proof that Payton did it. Payton denied committing these acts.

According to Kageyama's memo to Brown, Miller was aware of most of these incidents. Meigs, on the other hand, testified that he was under the impression from about May 1984 to June 1985 that the Santa Cruz office was running smoothly. It was not until May of 1985, when he finally met with Kageyama, that Meigs learned otherwise.

Kageyama, on August 29, 1985, filed a sexual harassment complaint with the State Personnel Board. Although Kageyama had submitted a memo to Brown and met with him, the record does not establish why she chose to file a complaint with SPB rather than pursue the matter through internal agency procedures. Whatever her reason, it is fair to infer that, at least at this time, Kageyama intended that the SPB, not Brown, investigate her complaint.

The SPB, on October 8, 1985, referred the case back to Kageyama, directing her to first attempt a resolution through

internal agency complaint procedures. Brown testified that no formal complaint was ever filed with him. He did not consider her lengthy memo of July 17, 1985 to him as a formal complaint. Nevertheless, as a result of his earlier contact with Kageyama in May, he wrote to her on November 4, 1985 "to address the situation which you stated was occurring at your work site." Among other things, Brown's letter informed Kageyama that counselor offices in Santa Cruz had locks installed, and also that locks on the outer doors had been changed.

Kageyama's complaints apparently were never resolved to her satisfaction, for on March 24, 1986 she filed in the Superior Court" a COMPLAINT FOR SEXUAL HARASSMENT, MALICIOUS DESTRUCTION OF PERSONAL PROPERTY, AND INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS. She named, as defendants, the Department of Rehabilitation, Larry Payton, Ken Miller and Charles Meigs. The lawsuit was still pending as of the close of the hearing in this matter.

Several witnesses testified about the differences they saw between the Kageyama-Payton case and the Cooper-Moore case.[15] Meigs felt that the charges against Moore were more

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[15]Miller is represented by the Attorney General's office in the Kageyama lawsuit. On advice of counsel, Miller refused the undersigned's order on the first day of hearing to testify in this proceeding about his role in the Kageyama-Payton case. Although his testimony would have been relevant on the issue of disparate treatment, Miller's refusal has not prejudiced Charging Party's case. Other testimonial and documentary evidence, especially Kageyama's July 17, 1985 memo to Brown,

serious. Since Moore had already been disciplined in the Cardenas case, another similar offense might open the State to liability. He therefore acted more quickly in pursuing the investigation of the charges against Moore than he did of the charges against Payton.

In concluding that the two cases were different, Brown, Meigs and Solstad also found it significant that Kageyama and Payton had lived together for years, and during 1984 they saw a therapist together. This suggested a reconciliation was possible and it also placed the allegedly offensive hugs in an entirely different light. Moore and Cooper, on the other hand, were merely co-workers with a completely different relationship

Brown testified about specific incidents which distinguish the two cases. He said his investigation revealed that the threat by Payton to kill Kageyama was nothing more than a mere misunderstanding. Also, while there was no concrete proof of many of the allegations made against Payton,[16] the offensive touching of Cooper by Moore was clearly established. Also, Brown suggested during his testimony that Kageyama may have

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has enabled the Charging Party to present his argument concerning the disparate treatment issue. Moreover, it is noted that Charging Party, despite Miller's refusal to testify, did not call Kageyama as a witness later in the hearing to testify about disparate treatment, nor has he raised the issue in its post-hearing brief, thus suggesting any claim of prejudice has been abandoned.

[16]For example, there was never any proof that Payton urinated in Kageyama's office, nor was there proof that he damaged her car.

contributed to the problem by screaming at Payton in the office.

Another totally separate incident of disparate treatment involved Karen Cooper and Counselor Chris Smart.; Cooper complained to Miller that Smart put his foot between her legs as she sat in a swivel chair. Although there was no touching, Cooper told Miller that it was "symbolic that he's trying to insert his penis in me." Cooper asked Miller not to contact Smart about the complaint, but Miller spoke to him anyway. According to Miller, Smart was "shocked" at the complaint. He apologized to Cooper and that ended the matter. There was no formal complaint filed.

On another occasion Miller received a complaint from a client that Cooper was trying to have sex with him. The complaint involved no physical touching, and was based instead on verbal suggestions and body language. Cooper emphatically denied it and the matter was dropped.

ISSUE

Whether James Alin Moore would not have received a letter of reprimand and eventually been discharged but for his protected activity?

DISCUSSION

Section 3519(a) prohibits discrimination against an employee for engaging in conduct protected by the Act, including:

> . . . the right to form, join, and participate in the activities of employee

> organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. (Sec. 3515.)

Novato Unified School District, supra, PERB Decision No. 210, sets forth the standards by which charges alleging discriminatory conduct are to be decided. The Board has summarized the test as follows:

> . . . a party alleging a violation . . . has the burden of making a showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision to engage in the conduct of which the employee complains. Once this is established, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of the protected conduct. As noted in Novato, this shift in the burden of producing evidence must operate consistently with the Charging Party's obligation to establish an unfair practice by a preponderance of the evidence. (California State University, Sacramento (1982) PERB Decision No. 211-H at pp. 13-14.)

This test is also used to decide discrimination cases under the **Dills Act.** See e.g. State of California (Department of Developmental Services) (1982) PERB Decision No. 228-S.

The test adopted by the Board is consistent with precedent in California and under the National Labor Relations Act (NLRA) requiring the trier of fact to weigh both direct and circumstantial evidence in order to determine whether an action **would** not have been taken against an employee but for the exercise of protected rights. See e.g., Martori Brothers Distributors v. Agricultural Labor Relations Bd. (1981) 29 Cal.3d 721, 727-730; Wright Line, Inc. (1980) 251 NLRB 1083

[105 LRRM 1169] enf., in part, (1st Cir. 1981) 662 F.2d 899 [108 LRRM 2513].[17]

Hence, assuming a prima facie case is presented, an employer carries the burden of producing evidence that the action "would have occurred in any event." Martori Brothers Distributors v. Agricultural Labor Relations Bd., supra, 29 Cal.3d at 730. Once employee misconduct is demonstrated, the employer's action,

> . . . should not be deemed an unfair labor practice unless the Board determined that the employee would have been retained "but for" his union membership or his performance of other protected activities. (Ibid.)

PROTECTED CONDUCT AND EMPLOYER KNOWLEDGE

Moore engaged in several types of protected activity during his employment in the Department. For example, he was chairperson of ROC, a statewide office. As ROC chairperson, Moore played an active role in scheduling and participating in meetings to develop strategies to deal with a variety of employment-related issues, e.g., computerization, subcontracting, production standards. He wrote letters to legislators regarding budgetary and other employment-related issues, and he signed petitions to legislators urging support

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[17]The construction of similar or identical provisions of the NLRA, as amended, 19 U.S.C. 151 et seq., may be used to guide interpretation of the SEERA. See, e.g., San Diego Teachers Assn, v. Superior Court (1979) 12 Cal.3d 1, 12-13; Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608, 616. Compare section 3519(a) of the Act with section 8(a) (3) of the NLRA, also prohibiting discrimination for the exercise of protected rights.

of AFSCME's campaign to improve rehabilitation services. On behalf of AFSCME, he was also active in monitoring the Department's computerization pilot project. He also monitored the Department's application of production standards, and he signed a petition seeking the reinstatement of a co-worker. Therefore, it is found that Moore engaged in protected activity, a point not contested by the Respondent.

Respondent argues, however, that those individuals who made the decision to terminate Moore had no knowledge of his protected activity. Therefore, they could not have been motivated by unlawful intent.

It is true, as Respondent argues, that the Charging Party must show that those individuals responsible for the decision to terminate him (i.e., those individuals who participated in the meeting on July 11, 1986) had actual or imputed knowledge of Moore's protected conduct. Konocti Unified School District (1982) PERB Decision No. 217; San Diego Community College District (1983) PERB Decision No. 368. An employer cannot retaliate against an employee for engaging in protected conduct if those ultimately responsible for the improper conduct do not even know of the existence of the protected conduct.

Charging Party has not shown here that the individuals who investigated the Cooper allegations (Brown and Enyart) or the individuals who, on July 11, 1986, reached the recommendation to terminate (Solstad, Kerosec and Englebach) were even aware of his protected activity. To the contrary, each of these

employees convincingly testified that they were not aware of the protected conduct. The Board has refused to automatically impute either knowledge of protected conduct or unlawful animus on the part of subordinate employees to the ultimate decision makers. See e.g., Konocti Unified School District, supra; Regents of the University of California (1983) PERB Decision No. 319-H.

However, a decision-making process, such as that which occurred on July 11, 1986, may be tainted where decision makers, even innocently, rely upon the input of other management officials who may have harbored an unlawful motive as a result of their knowledge of the protected activity in question. State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S.

In this case Meigs had knowledge of Moore's protected activity. On July 7 he talked to Englebach, a key participant in the July 11 meeting, about the possibility of terminating Moore if the allegations were substantiated. Also, Meigs was responsible in large part for the decision to reprimand Moore in the Cardenas case; and the letter of reprimand, in turn, played a part in the decision to terminate Moore at the July 11 meeting. In other words, because of the initial letter of reprimand, the Cooper complaint was viewed as a "second offense" by those at the July 11 meeting. Hawkins, another person who played a role in the Cardenas case, was also aware of Moore's protected conduct, having responded to Moore on

behalf of Fontanoza concerning the limited-term employee issue. Upon this admittedly tenuous basis, Meigs's and Hawkins 'knowledge of Moore's protected conduct is imputed to those individuals who made the recommendation to terminate Moore after the July 11 meeting.[18]

UNLAWFUL MOTIVATION

In his attempt to establish that he would not have been terminated but for his protected activity, the Charging Party relies essentially on three arguments to prove unlawful motivation. First, he asserts he was treated in a disparate manner. Second, he contends the investigations of his cases were conducted in a cursory manner which, also violated Departmental regulations. Third, he views the timing of the adverse actions taken against him as suspicious. Each of these arguments will be considered below.

Moore contends that Kageyama's allegations were greater in number and extremely serious, yet no formal investigation was conducted and no discipline imposed on Payton. In comparison, Charging Party asserts that Cooper's allegations were fewer in number and milder in degree, yet his case was investigated immediately and in a matter of weeks he was terminated. The Charging Party contends that the disparate manner in which his

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[18]In addition, Shaw had knowledge of Moore's exchange of correspondence with Martin, and he signed the letter of termination. While Shaw played no major role in formulating the recommendation to terminate, he nevertheless was in a position to review its contents and, at least theoretically, could have disagreed with the outcome.

case was treated points to an unlawful motive on the part of those involved.

It is well-established that an unlawful motive may be inferred from a situation where an employee who has engaged in protected conduct is treated differently from other employees for identical or similar conduct. Novato Unified School District, supra, p. 7; San Joaquin Delta Community College District (1982) PERB Decision No. 261, p. 8; San Leandro Unified School District (1983) PERB Decision No. 288, p. 11. However, the many differences between the Moore-Cooper case and the Payton-Kageyama case preclude a finding of disparate treatment.

Payton and Kageyama had lived together for many years. In January 1984, they began to end their relationship. They saw a therapist together during 1984. Consequently, at least during 1984, the Department saw this as a private matter with the possibility of a reconciliation, rather than as a workplace dispute. Cooper and Moore, on the other hand, had no prior relationship. They were simply co-workers. Therefore, there was no overriding possibility of a reconciliation.

It is true that the investigation of Cooper's complaint was undertaken almost immediately after Cooper reported her complaint to Meigs and he encouraged her to file a formal complaint. After Kageyama eventually reported her complaints to Meigs, he immediately put her in touch with Brown. Meigs thus responded to both women in a similar fashion. Kageyama

met with Brown, but for some unexplained reason she chose to contact the SPB rather than proceed through internal agency-procedures. Since no formal complaint was ever filed with Brown, he never investigated in a formal way.

In addition, a comparison of the offensive touching allegations shows no disparate treatment. As the result of a thorough investigation, it was determined that Cooper was a more credible witness than Moore with respect to these allegations. Thus, the Department felt confident of its proof. In comparison, as noted above, there was no formal investigation in Kageyama's case. By the time Kageyama eventually talked, to Meigs and contacted Brown the allegations of offensive touching directed at Payton involved incidents which were remote in time, and, more importantly, had occurred in 1984 when the two were still in therapy together. Kageyama made no allegations of offensive touching in 1985.[19] This placed the allegations against Payton in an entirely different setting.

Other 1985 allegations by Kageyama concerned incidents unsupported by proof that Payton was responsible, e.g., urine in Kageyama's office and damage to her car. Yet other allegations that Payton, during 1985, uttered "insulting sexual

[19]According to Kageyama's July 17, 1985 memo to Brown, the only incident in 1985 which came close to an offensive touching was Payton's attempt at physically preventing her from passing by him in a hallway at work. There was, however, no touching during this brief incident.

innuendos" to Kageyama, called her on the office intercom and breathed heavily into the phone, tried to get her private phone number and address, etc., while certainly offensive if true, did not involve unwelcome touching.

Another major difference between the Payton and Moore cases was that Moore had already been disciplined once, in the Cardenas incident, for behaving in an inappropriate manner with sexual overtones. It was feared by Meigs, who initiated the investigation of Cooper's complaints, that another similar offense could open the State to liability.

Based on the foregoing, it is concluded that there was no disparate treatment. While there are obviously some similarities between the two cases, the substantial differences described above preclude a finding of disparate treatment. These differences, not unlawful motive, led to the Department's different approaches to the disputes.

Arguments of disparate treatment concerning other employees are similarly unpersuasive. The Cooper-Smart incident, even if true, was a one-time occurrence which involved no actual touching. After Smart apologized the matter was dropped. The assertion that Cooper tried to have sex with a client, (Cooper denied it), also involved no touching. Even if true, it too was a one-time occurrence. Unlike the Cooper-Moore incidents, no formal complaints were filed in either case.

In his second argument, Moore contends that the investigations of the complaints were cursory and conducted in

a manner which violated the Rehabilitation Administrative Manual (RAM), the departmental rules and procedures governing investigation of adverse actions and sexual harassment complaints. Departure from established procedures or standards may permit the inference of an unlawful motive. Novato Unified School District, supra, p. 7. Similarly, a faulty investigation may raise the inference of unlawful motivation. Baldwin Park Unified School District (1982) PERB Decision No. 221, p. 16. In this case, however, any deviation from the RAM was harmless and the investigation was more than adequate.

The RAM contains several statements of supervisory responsibility in investigating adverse actions which are relevant here. RAM section 23741 states that

> When adverse action is necessary the supervisor should obtain an accurate statement of the disciplinary problem and collect full information on the case.

That section also sets out a series of five basic questions to be answered in "stating the case."[20]

RAM section 23471 also states that

> It is the supervisor's responsibility to gather the facts, investigate, and report the incident(s) with a recommended course of action.

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[20]Examples of questions to be asked are: Does the case call for adverse action? What is the exact nature of the violation? Under what conditions did it occur? When and how often have the violations occurred?

Section 23653.1, describes supervisory responsibility during the "fact-gathering interviews" as follows: "The supervisor should interview the employee to determine whether the employee offers any explanation which might refute or mitigate any or all of the charges."

RAM section 23742 further describes the "fact gathering" process. It sets out a long list of general tasks a supervisor "should" do when in the process of "gathering the facts about an incident of improper employee conduct."[21]

In a highly technical reading of the RAM sections cited above, Moore argues that the entire investigative responsibility for investigating adverse actions lies at the supervisory level. When Meigs took the Cardenas matter out of Miller's hands, contends the Charging Party, the RAM was violated, thus providing evidence of unlawful motive. This argument is not persuasive.

At the hearing the Charging Party and the Respondent stipulated that the precise letter of the RAM was not followed during the investigations of the charges against Moore. The respondent takes the position that the failure to rigidly adhere to the RAM procedures is not fatal to the investigations or to its case. The RAM procedures, according to the

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[21]According to RAM section 23742, the supervisor "should" do such things as: check the written record; make efforts to reconcile conflicting statements; make sure the employee knew the applicable standards of behavior; etc.

respondent, are only guidelines; they are not investigatory steps which are set in concrete.

The plain language of the RAM sections at issue here supports the respondent. While the RAM places general responsibility for investigating possible adverse actions at the supervisory level, it does not mandate any particular type of investigation be conducted. The supervisor is given great discretion in terms of what he or she "should" do in the fact gathering process. It is under this reading of the applicable RAM sections that the Department's conduct is evaluated.[22]

As I have already found, Meigs told Miller on December 18, 1985 to forward the materials to him. This might be viewed as cutting the immediate supervisor out of the process, but Meigs had valid reasons for doing so. He felt Cardenas' allegations were serious and Miller should have reported it earlier. Given the serious nature of the allegations, Meigs also felt someone with more experience should review the matter. In any event, Miller testified that his actual investigation had ended as of December 18, 1985 and

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[22]Respondent's interpretation of the permissive nature of the RAM sections was supported at the hearing by Meigs, Shaw and Englebach. Meigs said the RAM is to be used as a "guide depending on the circumstances." Englebach also characterized the RAM as a "guideline" for investigators. Shaw too testified that the RAM affords flexibility during investigations. He said the goal is to capture the "essence" of the case.

the necessary documentation had been assembled.[23] It is unclear what else, if anything, Miller could have done. Thus, even under Moore's interpretation of the relevant RAM sections, the procedure was not defective.

The remainder of the investigation at Meigs' level consisted of evaluating the documentation gathered by Miller, and consulting with Brown, Hawkins, and Englebach, all more experienced in such matters. Meigs clearly had a right to seek such advice. See RAM section 23747.

After reviewing the documents and completing the consultations, Meigs recommended Moore be given a formal letter of reprimand and required to write a sincere letter of apology, not particularly harsh penalties under the circumstances. Meigs found "most damaging" Moore's inability to recall several of the so-called touching aspects of the Cardenas case.

There is nothing in this process which suggests either a cursory approach or a significant deviation from RAM guidelines. Miller gathered the relevant facts, including Moore's version of the incidents, and passed them on to Meigs. With these facts in his possession, Meigs consulted more experienced people (Englebach was his immediate supervisor; Brown was the civil rights officer; and Hawkins was the

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[23]This included Cardenas' complaint to Knox, Knox's letter to Miller, and Miller's summary of his meeting with Moore, including Moore's version of the incident with Cardenas. Miller had not talked to Cardenas, but her version had been recorded earlier in her complaint to Knox.

employee relations officer), and recommended a formal reprimand because of the seriousness of the charge. And there is no evidence that any of these individuals harbored an unlawful motive. While honest disagreements may exist about different ways to investigate such a case, these do not transform Meigs' method to one which suggests an unlawful motive.

A similar analysis applies to the investigation of the Cooper complaint. Upon being approached by Cooper with allegations of sexual harassment, Stoll did not jump prematurely at the chance to initiate an investigation into the matter. He moved cautiously, advising Cooper to think seriously about filing a formal complaint. It was only after Cooper later decided to proceed, and told Meigs of her complaints, that Brown was contacted and the investigative process initiated.

Charging Party argues that the processing of Cooper's complaint violated RAM section 23631.6, which states:

> Any employee who feels he or she is being sexually harassed is encouraged to:
>
> 1. Make the person aware that their behavior is unwanted and inappropriate.
>
> If it continues,
>
> 2. Discuss the situation with the appropriate supervisor, Women's Program officer, Affirmative Action Officer or Civil Rights Officer. In cases where their immediate supervisor is the harasser, his/her supervisor is appropriate.
>
> If the sexual harassment continues,

> 3. File a sexual harassment complaint. Complaints will be processed through the Department's existing discrimination complaint process (RAM 23610-23623).

The investigation did not run afoul of these provisions. First, Cooper told Stoll that she had already tried, without success, to make Moore aware that his behavior was unwanted and inappropriate. Second, Cooper discussed her complaints with Stoll and Meigs. Meigs felt that the allegations were so serious that he "encouraged" her to file a formal complaint with the civil rights officer. There is nothing in the RAM which compels a different approach. The RAM merely "encouraged" Cooper to discuss her complaints with her immediate supervisors, which she did. She was not required to refrain from filing the complaint, a step she (not Meigs) decided to take after meeting with Meigs. Once this decision was made, an investigation was required.

The investigation itself was quite extensive. Two investigators were brought in from outside the Santa Cruz office. Enyart interviewed Meigs, Stoll and Cooper, as well as several other employees. He reported his findings to Kerosec. Brown too interviewed or attempted to interview twelve people. Among those he interviewed were Moore and Cooper.[24]

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[24]Moore claims his interview with Brown was conducted in violation of his "Weingarten" right to representation. See NLRB v. Weingarten, Inc. (1975) 420 U.S. 251, [88 LRRM 2689], which grants to an employee the right to have a union representative present at an investigatory interview with the employer which the employee believes may result in discipline,

At the July 11, 1986 meeting both Enyart and Brown were given a full opportunity to report their findings. Cooper's allegations were thoroughly discussed. Neither Brown nor Enyart, based on their investigations, described Moore in a favorable light. Essentially, Brown reported that Moore was equivocal in responding to the allegations, and both Brown and Enyart confirmed that Cooper was credible. The importance of the Cardenas case was also discussed. As a result of the discussion at the July 11 meeting, Solstad, Kerosec and Englebach recommended that Moore be terminated. Attorney Solstad was convinced that the allegations could withstand appellate challenge. Soon thereafter, Shaw and Burns approved the recommendation and Shaw signed the termination letter. Later, in August 1986, Director Fontanoza, based on Brown's investigative report, upheld Cooper's sexual harassment complaint.

It is recognized that the primary investigators of the Cooper complaint proceeded on separate procedural tracks under the RAM, Brown looking into the sexual harassment complaint and Enyart concerned with the adverse action. As Charging Party points out, this resulted in some jurisdictional overlap. This

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However, the employer's obligation to honor this right must be triggered by an employee request for union representation. State of California (Department of Forestry) (1988) PERB Decision No. 690-S. In this case there is no evidence that Moore made such a request. Therefore, even assuming the interview with Brown was a Weingarten-type meeting, Moore's argument is rejected.

somewhat unusual approach had never been used, and it resulted in shortcomings which, ordinarily, might be viewed with suspicion. For example, the person charged with investigating the adverse action (Enyart) never even interviewed Moore. However, in this instance Enyart's failure to interview Moore did not result in a gap in the investigation concerning Moore's response to the allegations. Because of the dual nature of the investigation, Brown reported on Moore's response. And there is no independent evidence that the dual nature of the investigation otherwise undermined a full development of the facts. In fact, it appears that it may have resulted in a more thorough development of the relevant facts.

Like the investigation of the Cardenas complaint, this investigation was not cursory, nor did it deviate from the RAM in any significant manner. There may have been equally effective approaches to investigating the Cooper case. That the Department did not choose another approach, which may have been more acceptable to Moore, does not transform the investigation described above into one which suggest an unlawful motive.

In his third argument, Charging Party asserts that the "timing is more than suspicious; it is outrageous." He points to the fact that Meigs took only one day to recommend a formal reprimand for the Cardenas incident. The reprimand followed by only two days Charging Party's visit to Los Angeles, as ROC chairperson, to review the computerization pilot project. In

addition, despite Meigs[1] hasty decision to discipline Moore, it took several months for the Department to issue the actual letter of reprimand.

Charging Party also argues that the termination came "on the heels" of the Clute petition. He asserts that Cooper's complaint "was solicited" shortly after the petition was presented to Meigs, and the exchange of correspondence between Moore and Martin also occurred about this time. Finally, Charging Party cites as evidence of unlawful motive the discussion, on July 3, 1986, (before the investigation was complete) between Meigs and Englebach concerning the possible discharge of Moore.

The close timing of an employer's action in relationship to an employees protected activity is evidence from which an unlawful motive may be inferred. North Sacramento School District (1982) PERB Decision No. 264. But here Charging Party's arguments are not persuasive.

There is nothing unusual about Meig's quick action in recommending a formal reprimand in the Cardenas case. He viewed the matter as serious and had the benefit of Miller's investigation upon which to base his recommendation. Meigs simply cannot be faulted for taking decisive action in this area.

Further, it was pure coincidence that Meigs[1] recommendation came only two days after Moore went to Los Angeles to review the computerization pilot project. It is unclear if anything

remarkable happened in Los Angeles, or if Meigs even knew that Moore made the trip. Even accepting Moore's assertions that Meigs knew of the visit to Los Angeles and that the visit coincided with Meigs' recommendation, the relationship of these events was dictated more by Knox' letter to Miller initiating the complaint than anything else. Therefore, it seems highly unlikely that Meigs would not have made the same recommendation had Moore not gone to Los Angeles. After viewing Meigs on the witness stand, it is my opinion that Moore's role as ROC Chairperson made little, if any, impact on Meigs.

The Department probably should have acted more quickly in issuing the actual letter of reprimand to Moore. But failure to do so seems harmless in the context of assessing the Department's motive. It certainly carries limited probative weight that some unknown person(s) in the personnel office were less than diligent in preparing the necessary paperwork to discipline Moore.

As Charging Party points out, Cooper's complaint came shortly after the Clute petition was submitted to Meigs. However, neither Meigs nor Stoll "solicited" the complaint, as Charging Party contends. It was Cooper who first approached Stoll and then met with Meigs. The proximity in time between the complaint and the Clute petition was created by Cooper's decision to file the formal complaint. The temporal relationship between the complaint and the petition was not created by either Meigs or Stoll.

The same analysis applies to the Moore-Martin correspondence. The exchange of letters occurred about the same time as the filing of the complaint by Cooper. Moore's letter to Martin was sent on June 20, and Cooper first approached Sto11 on June 26 about her complaint against Moore. But it was Cooper's idea to raise the matter initially and, after considering it more fully at Stoll's suggestion, she decided to proceed. No management representative controlled the sequence of events.

Finally, in early July 1986, before the investigation of Cooper's complaint had been completed, the possibility of discharge was discussed by Englebach and Meigs. However, the discussion was purely a hypothetical one; dismissal would be appropriate if the allegations against Moore were substantiated. This represents nothing more than a discussion two management officials might ordinarily have about the possible outcome of a serious matter. Realistically, no predetermined decision to terminate Moore can be read into this discussion.

Based on the foregoing, it is concluded that the timing of events in this case do not support an inference of unlawful motive. Even if these events permitted the inference of an unlawful motive, however, the ultimate outcome would not be affected because "coincidence in time", by itself, is insufficient to prove unlawful motivation. Charter Oak Unified School District (1984) PERB Decision No. 404.

Based on the foregoing, it is determined that an unlawful motive played no role in the Department's decisions to reprimand and terminate Moore. Therefore, it is concluded that the Charging Party has not established a prima facie case and the unfair practice charge is dismissed.

EMPLOYER JUSTIFICATION

Even assuming, as Charging Party contends, that the evidence showed an unlawful motive, this would not change the outcome here. Under the test for discrimination set forth in Novato Unified School District, supra, once the Charging Party raises the inference that the adverse actions were improperly motivated, the burden shifts to the Respondent to show that it would have terminated Moore regardless of his protected activity. In these circumstances the Respondent has the burden of producing evidence regarding the basis for its decision to discipline. Based on the findings and conclusions of the State Personnel Board, as described more fully above, it is concluded that, assuming the existence of a prima facie case, the Respondent has satisfied its burden. Moore would have been disciplined for the Cardenas complaint and terminated for the Cooper complaint even if he had not engaged in protected conduct. Protected activity does not immunize an employee from discipline which is otherwise plainly appropriate. See State of California (Department of Developmental Services) (1982) PERB Decision No. 228-S (discharge of union activist for, among

other things, sexually abusing a patient in a State hospital upheld.)

CONCLUSION AND ORDER

It is concluded that the charging party has not established a prima facie case under the Novato standards. Charging Party has shown only that he engaged in protected activity under the Act, and that some Department officials were aware of that activity. However, he has failed to show that any Department officials possessed an unlawful motive in imposing the adverse actions contested here. Lastly, even if Charging Party had established a prima facie case under the Novato standards, the Department has shown, based on the findings and conclusions of the SPB, that it had valid reasons for imposing the adverse actions and Moore would have been terminated even if he had not engaged in protected conduct.

Based on the foregoing and the entire record, Unfair Practice Charge No. SF-CE-85-S is hereby DISMISSED.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final unless a party files a timely statement of exceptions with the Board itself at the headquarters office in Sacramento within 20 days of service of this Decision. In accordance with PERB Regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. See California Administrative Code title 8, part III,

section 32300. A document is considered "filed" when actually-received before the close of business (5:00 p.m.) on the last day set for filing, ". . . or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing . . ." See California Administrative Code, title 8, part III, section 32135. Code of Civil Procedure section 1013 shall apply. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. See California Administrative Code, title 8, part III, sections 32300, 32305, and 32140.

Dated: July 28, 1988

Fred D'Orazio
Administrative Law Judge